

1 isn't true, which it is. So the answer is that what
2 they do is they've got a whole room full of thousands
3 of little EAs and they take all of their activities and
4 parse them down into little EAs and nothing ever is
5 added up. And that's how they do it.

6 And they're doing that with Title V and
7 everything else around here. This little piece isn't
8 important and that little piece isn't important. And
9 if you ask them about the EAs which are never noticed
10 to the public -- people think EA has to be noticed to
11 the public. That's not true. The regulation clearly
12 states it does not have to be noticed. These federal
13 agencies have whole rooms full of these things and they
14 say, well, you can come down and look through our
15 drawers if you want to.

16 MR. VOGEL: I think it's about time to
17 move on to another speaker. If we have somebody on the
18 line.

19 MR. FREDERICK: This is Dave Frederick.
20 I think I'm here for the 10:20 slot.

21 MR. VOGEL: Thank you, David. Please go
22 ahead and speak -- let me remind everyone on the line
23 that we are recording this for audio transcript and
24 also written transcript. Go ahead, Dave.

25 MR. FREDERICK: Thank you. My name is

1 David Frederick. I'm a lawyer down in Texas and I
2 represent various, I don't know, labor unions,
3 environmental associations, Sierra Club periodically,
4 concerned with issues of air issues in Texas, and
5 therefore, we've had some experience with the Title V
6 program.

7 And I guess my overarching thought about
8 it in Texas is -- and I don't know the extent to which
9 this is a problem elsewhere in the country -- there's
10 some positive things about the program to which I will
11 turn in a moment, but the things that I'm most often
12 frustrated about by the program is the State of Texas'
13 penchant for incorporating by reference the various
14 underlying permit provisions to which the Title V
15 operator is subject.

16 So, for example, here in the not too
17 distant past we commented on behalf of a labor union
18 and an Indian tribe on a Title V permit for a carbon
19 black facility in Texas. And when one looked at the
20 applicable requirement summaries that the State of
21 Texas has provided, TCQ had provided, it would state
22 that there was one emission unit, which was a flare,
23 but it was given an emission unit number and then said
24 what's the emission limitation?

25 Well, the emission limitation is PSD.

1 And then what's the standard? Well, the standard is
2 the PSD standard that's set out in this underlying
3 permit, and it cites just the permit, doesn't tell you
4 what the standard is. Then there's a textual
5 description of what his limitation is. That textual
6 description is also simply a statement of the permit
7 number with no textual description at all.

8 If you want to know what the monitoring
9 is -- that is required of this particular source under
10 that particular PSD permit, you don't know because it
11 just says the PSD permit number, same thing for record
12 keeping requirements.

13 Well, one can potentially go back and
14 find -- one who wants to comment can potentially go
15 back and find the underlying PSD permit, but one may
16 well not be able to find, for example, application
17 materials that were submitted in order to get the PSD
18 permit. One can find it. It's not like it's just
19 ultimately impossible to do, but it's become a heavier
20 and heavier burden for one who wants to comment on this
21 draft federal operating permit.

22 State of Texas does that a lot. We used
23 to say that it drafts permits and send them out for
24 comment basically simply referencing the
25 underlying -- in this case NSR permit. And the

1 commenter is really at a -- it's almost impossible with
2 anything like what most people would consider to be a
3 reasonable use of time to comment on such a permit.

4 It's also -- in fact, the way that the
5 final permit ends up being written, it's almost
6 impossible for anybody who might inspect an
7 investigator's report, in our case for TCEQ, that's out
8 in the field to determine whether or not this person
9 complaint with the Title V permit or not because you've
10 got the underlying NSR permit and you might in some
11 cases have to look back to the application materials
12 that were submitted along with the -- along with the
13 application for the underlying -- so that I think
14 something positive that EPA could do for the Title V
15 program is type and I would say eliminate, but
16 eliminate may be too strong of a word, but much narrow
17 the instances in which a Title V permit may set out
18 limitations simply by referencing some other permit.

19 So that's one thing. I think the other
20 thing at least in Texas -- I don't know how broadly
21 this is a problem with the Title V program NSR permit
22 is that in Texas we have these permits by rule which
23 are, of course, I think, common to most programs.

24 Ours, however, were not prior to sometime
25 in early 1990 published anywhere. They were kept on

1 sheets of paper at our agency. And they're quite a
2 number of them. There might be, say, as many as 125 of
3 these permits by rule that apply to relatively small
4 sources but nonetheless been submitted as part of the
5 SIP and they are, therefore, applicable to requirements
6 oftentimes for a major facility.

7 These things might have come out in five
8 or six generations. We might have had one, a version
9 from '85, another version from '89, another version
10 from '93, another version from '97 and so forth. Well,
11 the draft permit that TCEQ issues, and ultimately the
12 final permit, may list one or two of the permits by
13 rule in a table which is the same table that's got the
14 listing for the other applicable requirements.

15 There may be a listing, again, not of the
16 individual requirements of the permit by rule but,
17 rather, just of the number of the permit by rule or the
18 number of permit by rule and the date. These things
19 may be listed in this table of applicable requirements.

20 But then TCEQ, because it isn't sure
21 which permit by rule might apply to a facility and
22 apparently is not forcing applicants to identify the
23 universe of permits by rule that the applicant claims
24 apply or that is on which the applicant relies is the
25 exclusive list of permits by rule that apply to that

1 facility, TCEQ includes this additional couple of
2 pages.

3 And the permit I'm looking at, anyway,
4 for this particular carbon black facility that says,
5 Additional permits by rule in effect prior to a certain
6 date potentially apply to this operating permit, and
7 then follows three or four pages of every permit by
8 rule of that could conceivably apply to anybody.

9 For example, for this carbon black
10 facility we've got listed permits by rule that might
11 apply, potentially apply for semiconducting
12 manufacturing, for portable Roth pressures, for uranium
13 recovery facilities. Well, I know the system and so
14 I'm not going to go bother to find out whether any of
15 those particular permits by rule that are listed as
16 potentially applicable do apply. I feel fairly
17 confident that semiconductor manufacturing permits by
18 rule do not apply to my carbon black manufacturer.

19 On the other hand, there are some in
20 here, quite a number of them, a permit by rule for
21 boilers, heaters, and other combustion devices. And
22 there are listed in here six versions of this
23 particular permit by rule that might apply to my
24 facility.

25 Well, you know, this is really not

1 feasible. I mean, once you look at each one of those
2 six or seven things, maybe it does apply, maybe it
3 doesn't apply, there's something called organic and
4 inorganic liquid loading and unloading permits by rule.
5 There are three permits by rule and each one of those
6 permits by rule has associated within them in the
7 neighborhood of five different versions which
8 apparently may apply to some source at the facility.

9 This type of failure to force the permit
10 applicant to identify the limitations to which the
11 applicant believes the facility is subject, and I guess
12 really stated another way, to define universe of --
13 define by exclusion the universe of restrictions to
14 which that that applicant is never going to claim do
15 apply to this facility.

16 That doesn't seem to be happening. So
17 it's a variation of the incorporation by reference
18 problem, but it's a failure ultimately to be very
19 specific about -- to be sort of specific about the
20 limitations that apply to a particular permit. So
21 something positive EPA could do would be to narrow the
22 ability of states to defer decision-making as to
23 exactly what are the requirements that apply to a
24 particular source.

25 The third thing and I think the last

1 criticism I would level the program in Texas is that
2 this matter of prompt reporting of deviations, in Texas
3 prompt reporting of deviation is defined to be six
4 months after the deviation has occurred.

5 And there's some exceptions to this
6 depending on the exact character of the deviation, but
7 the fallback is, if you don't fall into one of the
8 exceptions, then -- which would call for a shorter
9 reporting period, then the fallback position is that
10 you have to report in six months.

11 Well, six months is just not prompt in
12 almost anybody's mind. And there's some unfortunate
13 Fifth Circuit case law to support TCQ's ability to
14 impose the six-month deadline as opposed to some
15 shorter deadline and continue to refer to it as prompt.

16 But that's something EPA could cure. EPA
17 could just by fiat -- well, by regulation pass comments
18 on it and so forth, but in the end address the question
19 under what -- are there any circumstances in which six
20 month deviation reporting could possibly be considered
21 prompt.

22 Positive things we've seen down here. I
23 have been fairly happy, actually, with TCQ's
24 responsiveness to criticisms of the monitoring that is
25 included in permits. We have had success with pointing

1 out that some particular -- there was no monitoring for
2 some particular restriction on -- on an applicable
3 requirement that didn't have any monitoring associated
4 with it or that had inadequate monitoring associated
5 with it. And in both those instances TCEQ has come
6 forward with a requirement for some additional
7 monitoring.

8 Now, you know, in individual instances I
9 might claim or protest that the monitoring -- TCEQ is
10 now requiring the new monitoring is inadequate, but it
11 is nonetheless undeniably a step forward from the
12 situation that existed prior to our having commented on
13 the inadequacy of the monitoring and prior to TCQ's
14 having required a greater level of monitoring.

15 In one particular instance -- for
16 example, we had an opacity requirement that was
17 monitored once a year and we said this is not really
18 monitoring. You're never assured compliance by
19 monitoring opacity once a year.

20 And TCEQ came back and said, oh, sure,
21 you're right about that. We now have to monitor every
22 three months. Well, you know, my personal opinion is
23 that monitoring once every three months does not ensure
24 that the opacity requirement is being met, but I have
25 to admit that it's four times better than once a year.

1 I think an exception -- so that's a
2 positive thing we see down here and EPA should do what
3 it can to encourage states to be more aggressive on
4 requiring monitoring. And my impression from the rule
5 change that occurred the first part of this year, I
6 believe it is, when EPA declined to set up a particular
7 section of this regulation as justification for
8 imposing new monitoring, I thought that was a step
9 backwards, actually. I understand complicated so --

10 MR. VOGEL: David, you need to draw your
11 presentation to a close.

12 MR. FREDERICK: I'm sorry about that.
13 The other positive things -- I will skip to the last
14 positive thing that's happened down that. We are
15 actually aware of one very significant case where the
16 compliant certification has forced lower level of
17 source employees to really be sure that what they would
18 certify is something that they believe to be factually
19 true. And in this one instance the employee, a
20 long-time employee finally just said, you know, I don't
21 think this is true, I can't certify to it, brought it
22 to the attention of management, management didn't
23 respond the way we believe it should have, but
24 nonetheless, the employee's unwillingness to falsely
25 certify, as he saw it, compliance has led to a fair

1 amount of analysis at the source, analysis by the
2 agency.

3 It has had a positive effect of forcing
4 people to determine whether or not, in fact, source was
5 in compliance. So down here we see some negative
6 things I mentioned, but we also do see some positive
7 stuff about the program.

8 MR. VOGEL: Thank you. Do we have
9 questions from the panel? Kelly.

10 MS. HARAGAN: Hi, David, this is Kelly.

11 MR. FREDERICK: Hi, Kelly. I recognize
12 your voice.

13 MS. HARAGAN: I had a question about you
14 talked mostly about incorporation by reference as it
15 related to permits and permits by rule. What do you
16 think about incorporation by reference for like federal
17 regulations or state rules?

18 MR. FREDERICK: I mean, I'm not a fan of
19 it really. I think it adds another step in the process
20 that somebody is reviewing a draft permit must go
21 through or an inspector must go through when trying to
22 determine exactly what the underlying requirement is.
23 Still, I think those are less of a problem because the
24 underlying source material is so much easier found.
25 It's so much easier to find than a state regulation or

1 a federal regulation than it is to find, you know, a
2 particular permit by rule that was published in 1987
3 but never published in any sort of rule books or codes
4 or that it is defined in application that was made for
5 a PSD permit in 1980, you know.

6 MS. HARAGAN: Okay, thanks.

7 MR. VOGEL: Steve Hagle.

8 MR. HAGLE: Hi, David.

9 Mr. Frederick: Good afternoon, or
10 morning I guess it still.

11 MR. HAGLE: This is Steve Hagle from
12 Texas. David, the permits by rule that you mentioned
13 in the permits that were just listed, I mean, part of
14 our discussions with Kelly and others in Texas was to
15 eliminate that process to actually require facilities
16 to identify specific permits by rule in their
17 applications and in the permit, and so I'm wondering
18 how old the permit that you're referring to is.

19 MR. FREDERICK: These were some comments
20 we made towards the end of 2002 or early 2003, so we're
21 going on now -- those comments are going, let's say
22 they're two years old.

23 MR. HAGLE: Okay. Thank you.

24 MR. VOGEL: Mike Wood.

25 MR. FREDERICK: I'm glad to hear that

1 that is the process, that that is sort of the new
2 direction here.

3 MR. WOOD: Hello, David. This is Mike
4 Wood with Weyerhaeuser Company.

5 MR. FREDERICK: Good morning.

6 MR. WOOD: Good morning. I wanted
7 some -- I would like to hear your suggestion for how
8 those NSR permit requirements could be incorporated
9 into the Title V.

10 MR. FREDERICK: Well, I have an off the
11 top of my head suggestion that might or might not prove
12 to be feasible, but then I also just have seems like
13 conceptually the fundamental way they could be
14 incorporated is for the permit writer to take from the
15 NSR permit whatever the limitation is and reproduce it
16 in the Title V permit, so that whatever the limitation
17 was is in the NSR permit and the permit writer has at
18 least as easy access, and frankly, easier access to
19 that than would the public or the inspector, and just
20 lift that out and reproduce it in the Title V permit.

21 Having said that, there -- it might be
22 possible -- because Texas is a big state, we've got a
23 bunch of these permits to do. I don't really know how
24 uniform or how many of the NSR requirements for
25 refineries, let's say. You got a bunch of refinery

1 source for NSR permits, I don't know if the particular
2 restriction included in those permits are sufficiently
3 standard that it would make sense to have a set of
4 regulations that set out, okay, this is standard NSR
5 permit term number 42 and it provides such and such
6 with such and such kind of monitoring, so that there is
7 force.

8 People doing Title V permits could
9 incorporate by reference that requirement by saying
10 standard NSR provision 42 applies to this site or to
11 this source. That may be a level of work that is
12 coming up with this table, if you will, of standard NSR
13 provisions may be so -- it may not be worth the work.
14 There may not be enough facilities covered by a
15 particular single provision to make it worthwhile to
16 have a statement of it in regulation. But that's the
17 only shortcut I see off the top of my head, to actually
18 taking the underlying NSR permit and extracting from it
19 whatever the limitation is and reproducing that
20 limitation in Title V permit.

21 MR. VOGEL: Verena Owen.

22 MS. OWEN: Hi, this Verena Owen from the
23 Lake County Conservation Alliance in Illinois. I am
24 not familiar with a table of applicable requirements.
25 Actually kind of sounds like a good idea to me. Does

1 that include a listing of all underlying NSR permits?

2 MR. FREDERICK: It does. Well, it
3 should, yes. I mean, you -- my experience with it, at
4 least in Texas, is that it's pretty good about telling
5 you what the number of the NSR permit is.

6 MS. OWEN: I totally agree because in
7 Illinois that would have certainly been very helpful to
8 have a listing of underlying permits. Is this table
9 part of the statement of basis?

10 MR. FREDERICK: I couldn't swear that it
11 is. Whenever I get a statement of basis, I get with it
12 a draft permit, and it certainly -- of course, it is a
13 part of the draft permit so. . .

14 MS. OWEN: So does the state of basis --
15 my question goes more does the statement of basis kind
16 of individualize the listing of all these permits by
17 rule in the table of applicable requirements at all?
18 Does it refer to it?

19 MR. FREDERICK: Steve is still on the
20 line from Texas. He could probably answer that
21 question for you better than I can.

22 MS. OWEN: Let's ask him then.

23 MR. FREDERICK: My impression is that the
24 statements of basis could be made more specific to the
25 individual permit to which they apply, but I am

1 sensitive to the difficulty of writing statements of
2 basis in a state where you've got as many Title V
3 permits as Texas has.

4 MS. OWEN: Thanks. Steve is sitting
5 right across from me at the table. Let's ask him.

6 MR. HAGLE: And, David, I can't answer
7 that question. I can't remember whether -- I don't
8 think the table is actually referenced in the statement
9 of basis, but I think there is a listing of NSR permits
10 and the applicability in the statement of basis, but I
11 can find that out and certainly provide that to you. I
12 can't remember about the statement of basis.

13 MS. HARAGAN: The decision trees are
14 basically what make up the statement of basis now,
15 which we could show you. It's pretty difficult to
16 figure out.

17 MR. VOGEL: We have time for one
18 question. Don van der Vaart.

19 MR. VAN DER VAART: Just real quickly,
20 David, just to sum up both your likes and your
21 dislikes. Did I get a -- would it be fair to say that
22 you're looking for a permit that you could look at just
23 look -- by just looking at the permit, decide whether
24 the facility is in compliance or not compliance and
25 anything that gets in that way gets in the way, is that

1 what you're beef is?

2 MR. FREDERICK: I think we should try to
3 move as close to that objective, that goal as possible.
4 And I think there's movement we can still make in that
5 direction. I am willing off the top of my head to
6 think that the question that Kelly Haragan asked
7 earlier about would you need to really list the
8 limitations in the permit if they were also codified in
9 either a state or federal regulation. And maybe you
10 don't need to do that, and maybe that's something we
11 could leave out of the permit, even though that did
12 require an extra step for review of the facilities.

13 But you got -- I mean, I don't want to be
14 absolute on your question to me made it sound, but I do
15 think we do need to move further in that direction than
16 we are right now.

17 MR. VAN DER VAART: Would you want, for
18 example, whatever requirements may be that are
19 referenced, would you still want the permit to list
20 what the monitoring results should be, you know, that
21 stem from that so that they view that just as the
22 authority and then here's the take home lesson, you've
23 got to do this monitoring and it's got to say this? Is
24 that the kind of thing you're looking for?

25 MR. FREDERICK: No, I don't think what

1 the monitoring was so that you had -- to take the
2 opacity example, that you have to monitor using method
3 9 every day or every month or something like that.

4 MR. VOGEL: Thank you, David.

5 MR. FREDERICK: Pleasure to be here.
6 Sorry I spoke a little too long.

7 MR. VOGEL: Is Sharon Genasci on the
8 line? Do we have Robert Ukeiley?

9 MR. UKEILEY: Yes.

10 MR. VOGEL: Okay, Robert, go ahead.
11 You'll have ten minutes for presentation and ten
12 minutes for questions and answers. I'll remind you
13 that we are recording this for audio and written
14 transcript.

15 MR. UKEILEY: Thanks. My name is Robert
16 Ukeiley. I'm an attorney in private practice in
17 Kentucky. I've been doing Clean Air Act litigation for
18 ten years in a bunch of different states, have kind of
19 alternated between private practice representing
20 nonprofits and actually working for nonprofit public
21 interest law firms, but all my work has obviously been
22 on the side of community and environmental groups.

23 I guess I just want to start out with a
24 general statement that in general I find that Title V
25 permits are a very useful tool. I remember working on